BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES NICITA,
Petitioner,

vs.

CITY OF OREGON CITY,
Respondent,

and

HACKETT HOSPITALITY, LLC,
Intervenor-Respondent.

LUBA No. 2018-038

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

James J. Nicita, Oregon City, filed the petition for review and argued on his own behalf.

Carrie A. Richter, Portland, filed a response brief and argued on behalf of respondent. With her on the brief was Bateman Seidel, P.C.

Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson and Wyatt, P.C.

ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 11/30/2018

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals two decisions by the city commission that (1) denied petitioner's request for a waiver of the city's fees for his local appeal; and (2) approved with conditions a development plan for a hotel and mixed-use building on property zoned Mixed Use Downtown.

MOTIONS TO FILE REPLY BRIEFS

Petitioner moves to file two reply briefs in response to the city's response brief and intervenor's response brief. Petitioner moves to exceed the page limit in OAR 661-010-0039. Respondent and intervenor do not oppose those motions or briefs and they are allowed.

ARGUMENTS INTRODUCED AT ORAL ARGUMENT

OAR 661-010-0040(1) provides that LUBA "shall not consider issues raised for the first time at oral argument." At oral argument, intervenor and the city objected that some of the issues that petitioner presented at oral argument were not included in the petition for review and requested that LUBA not consider those issues. That request is granted. *Newbrook v. City of Portland*, ___ Or LUBA ___ (LUBA No 2017-113, Aug 8, 2018) (slip op at 4); *NAAVE v. Washington County*, 59 Or LUBA 153, 156 (2009).

FACTS

The subject property is approximately four acres in size and is located in downtown Oregon City, near the End of the Oregon Trail Interpretive Center.

The property is designated Mixed Use Downtown in the city's comprehensive plan and zoned Mixed Use Downtown. Surrounding existing land uses include a train station, landscape supply lot, auto repair, and metal fabrication. Record 590. Hackett Hospitality, LLC (intervenor) applied for approval of a general development concept plan for a mixed-use project including hotel, multi-family residential, retail/commercial, and office uses to be constructed in two phases over 10 years, and a detailed development plan for Phase 1, including a five-story, 99-room hotel. Phase 2 includes 131 multi-family residential units and 9,500 square feet of retail space. Record 40.

The planning commission approved the development plan with conditions and denied petitioner's request for reconsideration. Record 43. Petitioner appealed the planning commission's decision to the city commission and paid, under protest, an appeal fee of $3,488 for the local appeal to the city commission. Petitioner also requested a fee waiver for his appeal.

On February 7, 2017, the city commission conducted a hearing on petitioner's appeal. The city commission first held a hearing on petitioner's appeal fee waiver request. Following the appeal fee waiver hearing, the city commission conducted a hearing on the substantive issues of petitioner's appeal. Record 41. On March 21, 2018, the city commission denied the appeal and upheld the planning commission's decision approving the development plan with conditions. On March 22, 2018, the city commission issued two separate final orders with findings and conclusions. The first order denied

petitioner's fee waiver request and is titled, "In the matter of a request by [Petitioner] for a waiver of appeal fees pursuant to OCMC 17.50.290(C) and a request for the City Commission to initiate an appeal on its own motion, relating to City appeal file no. AP-17-0006." Record 28. The second order approved intervenor's development plan with conditions and is titled, "In the matter of an Appeal (City file no. AP-17-0006) by [Petitioner] of applications approved for development of property located at 415 17th Street, Oregon City, Oregon and specifically described as tax lots 601, 900, 1000, 1100, 1200, 1300 and 1301 of Clackamas County assessors map no. 2-2E-29CA (City files nos. CP-17-0002, DP-17-0003, and NR-17-0004)." Record 40. We discuss the two city decisions that petitioner appealed in more detail below.

FIRST ASSIGNMENT OF ERROR[1]

In his first assignment of error, we understand petitioner to argue that the city commission improperly construed the applicable law in denying his fee waiver request and charging petitioner a "base fee" for the appeal and, after rendering its decision, invoicing petitioner for "actual attorney fees" for the local appeal.[2] *See* ORS 197.835(9)(a)(D) ("the board shall reverse or remand

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[1] In an order issued this date, we decide several pending motions related to this appeal. *Nicita v. City of Oregon City*, __ Or LUBA __ (LUBA No 2018-038, Order, Nov 30, 2018).

[2] On March 22, 2018, the city sent an invoice to petitioner for the city's actual attorney fees for the local appeal, in the amount of $4,427.50. Record 10.

the land use decision under review if the board finds * * * [t]he local government * * * [i]mproperly construed the applicable law").

Authority for and limitations on the city's authority to assess appeal fees are found in ORS 227.180(1)(c), which provides, in part:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript."

Oregon City Municipal Code (OCMC) 17.50.290 provides, in pertinent part:

> "The city may adopt by resolution, and revise from time to time, a schedule of fees for applications and appeals. Fees shall be based upon the city's actual or average cost of processing the application or conducting the appeal process. The only exception shall be the appeal fee for a Type II decision, which shall be limited by ORS 227.175.10.b. The requirements of this section shall govern the payment, refund and reimbursement of fees.
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> "A. Payment. All fees shall be due and payable at the time the application or appeal is submitted. No application or appeal shall be accepted without the proper fee being paid.
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> "* * * * *
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> "C. Fee Waivers. * * * Appeal fees may be waived, wholly or in part, by the city commission, if the city commission finds that, considering fairness to the applicant and to opposing parties, a full or partial waiver of the appeal fee is warranted. * * *"

The appeal fee structure in OCMC 17.50.290 was enacted in 2004 as part of Ordinance No. 03-1014. Later in 2004, the city adopted Resolution 04-01

providing that in addition to a base appeal fee, appellants will be required to pay the "actual city attorney fees." Record 495. Appeal costs were calculated by estimating city staff time and costs, excluding legal services. Record 31. The base appeal fee is increased annually based on estimated staff costs calculated using an estimated average of processing time multiplied by hourly staff salary and overhead and adjusted for inflation based on the consumer price index. Record 32. The applicable fee resolution set the fee for petitioner's appeal at $3,488 plus actual city attorney fees. Record 487.

Before the city commission, petitioner challenged the appeal fee as part of his fee waiver request under OCMC 17.50.290(C). The city rejected petitioner's argument that the appeal fees were unfair by comparison to the $50 fee for an appeal from the Historic Review Board to the city commission. Record 34. Petitioner also argued that the city had been inconsistent in collecting actual attorney fees authorized by the applicable fee resolution. Record 36.

The city determined that a full or partial waiver of the appeal fee was not warranted and denied petitioner's request. Record 39. The city commission interpreted the fairness evaluation required by OCMC 17.50.290(C) to be limited to the circumstances affecting parties with respect to review of the subject application. The city explained that petitioner, as the appellant, bore the burden to persuade the city commission that the appeal fee should be waived, and that petitioner had not carried that burden, but instead challenged the

appeal fee itself. Record 29. The city commission concluded that the amount of appeal fee is appropriate and consistent with OCMC 17.50.290 and ORS 227.180(1)(c) "because [the fee] reflect[s] the average planning and engineering costs and actual legal services costs of processing an appeal." Record 32.

In his first assignment of error, petitioner argues that the city improperly construed OCMC 17.50.290(C) in denying his fee waiver request and that the appeal fees that the city charged him are inconsistent with ORS 227.180 and OCMC 17.50.290 for reasons discussed below.

A. Fiscal Exception

The city argues that LUBA lacks jurisdiction to review the city's appeal fee decision. Respondent's Brief 5. The city argues that all or a portion of the city's appeal fee decision falls within the so-called "fiscal exception" to LUBA's jurisdiction. The city relies on *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

In *Montgomery*, LUBA had remanded the city's decision denying the petitioner's subdivision application in a previous appeal. In a subsequent decision, the city sought reimbursement from the petitioner for the cost of processing the subdivision application. Petitioner appealed the city's fee decision to LUBA, and the city argued that the fee decision was not subject to LUBA's review. We explained that, while our review of fee issues was somewhat inconsistent, "it is reasonably clear" that LUBA has jurisdiction to

review "'as-applied' challenges to those fee schedules that arise in the context of a LUBA appeal of a land use decision or limited land use decision where the fee was required and paid at some point in the local process that led to the final decision on the permit application." *Id.* at 138. "In other words, the permit fee was paid during and was arguably part of the same local land use proceeding that led to the permit decision on the merits that was on appeal to LUBA." *Id.* at 138–39.

We determined that the petitioner's appeal in *Montgomery* was outside our review because the fee dispute arose after the substantive decision denying the subdivision application. We opined that the petitioner "could have challenged the fee the city charged petitioner to process his subdivision application in his [prior] LUBA appeal that challenged the [subdivision] decision on the merits." *Id.* at 139. However, we observed that the city did not make a final decision on the processing fee amount until more than a year after it had rendered its decision denying the subdivision application. *Id.*

In *Montgomery*, we observed that it may be "appropriate for LUBA to resolve any permit application fee or permit appeal fee disputes that may arise as part of a land use proceeding, *in an appeal of the permit decision that results from those land use proceedings*." *Id.* at 140 (emphasis in original). However, we held that we do not have jurisdiction to resolve a fee dispute that arises after the decision on the underlying land use application becomes final. Accordingly, we held that the fee dispute in that case was a purely fiscal matter

not subject to our jurisdiction, because the challenged fee decision postdated the city's decision on the petitioner's subdivision application and was "entirely divorced from the merits of that subdivision decision under applicable land use law." *Id.*

Unlike the petitioner in *Montgomery*, petitioner in this case challenged the city's appeal fee during the city's proceeding on intervenor's land use application. The city commission addressed and rejected all of petitioner's legal challenges to the city's appeal fee structure, but the city did not, and as a practical matter could not, issue a decision regarding the actual amount of the attorney fees petitioner would eventually be charged as part of those appeal fees.

We conclude that petitioner's as-applied challenge to the appeal fee and the city's rejection of petitioner's legal challenges to the city's future assessment of actual attorney fees is within our scope of review. However, we conclude to the extent that petitioner's first assignment of error challenges the *amount* of the actual attorney fees set out in the invoice at Record 10, that challenge is outside our scope of review because that fee dispute arose after the city issued the invoice and more importantly, after the city made a final decision on petitioner's appeal. The fact that the local record includes the invoice for the actual attorney fees petitioner was charged for his local appeal does not convert the amount of the fees in that invoice into an issue that is reviewable by LUBA.

B. Waiver

The city argues that petitioner waived his arguments challenging the appeal fee because petitioner's arguments in his petition for review vary from those raised before the city commission. Petitioner replies, and we agree, that petitioner raised the issue and challenged the city's authority to charge an appeal fee based on asserted limitations on the amount of the appeal fee. The issue raised in the first assignment of error is not waived. *See DLCD v. Tillamook County*, 34 Or LUBA 586, *aff'd*, 157 Or App 11, 967 P2d 898 (1998) (ORS 197.835(3) and ORS 197.763 require that petitioners at LUBA have raised the issues they wish to raise at LUBA during the local proceeding; however, that restriction does not apply to individual arguments regarding those issues).

C. OCMC 17.50.290

Petitioner asserts that the city improperly construed OCMC 17.50.290 for two reasons. Petitioner first argues that the city misconstrued OCMC 17.50.290(A), which provides that "[a]ll fees shall be due and payable at the time the application or appeal is submitted," by charging petitioner for actual attorney fees after the appeal was concluded. Petitioner asserts that OCMC 17.50.290(A) requires the city to "demand an up-front deposit for any portion of the attorney fees." Petition for Review 26.

We are required to accept the city commission's interpretation of its own comprehensive plan and land use regulations if the interpretation is plausible

and not inconsistent with the express language, purpose, or policy of the comprehensive plan or land use regulations. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).[3] We agree with the city that it plausibly interpreted its code to allow an appeal to proceed without requiring a deposit for actual attorney fees, given that actual attorney fees will not be ascertainable until the appeal is complete.

Petitioner next argues that the city misconstrued OCMC 17.50.290(C) and that the city's interpretation of its fairness standard is not plausible. The city commission may waive appeal fees, "if the city commission finds that, considering fairness to the applicant and to opposing parties, a full or partial

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[3] ORS 197.829(1) provides:

> "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

waiver of the appeal fee is warranted." OCMC 17.50.290(C). The city commission interpreted the fairness evaluation required by OCMC 17.50.290(C) to be limited to the circumstances affecting parties with respect to review of the subject application and that, considering fairness to intervenor and petitioner, petitioner had not demonstrated that waiver of the appeal fee was warranted. Record 39. Petitioner has not established that the city's interpretation of its own code is implausible and, thus, we are required to affirm it.

D. ORS 227.180(1)(c)

Petitioner argues that the city's fee appeal fee violates ORS 227.180(1)(c) for three reasons: (1) the fees are not effective because they were adopted by resolution and not by ordinance, (2) the fees were not calculated based on an "arithmetic" average, and (3) the fees include both average and actual costs. Petition for Review 13–26.

We consider petitioner's challenge an as-applied challenge to the appeal fee that the city charged him. Thus, our inquiry on review is whether the appeal fee that the city charged petitioner pursuant to the previously adopted fee schedule is "more than the average cost of such appeals or the actual cost of the appeal." ORS 227.180(1)(c); *Young v. Crook County*, 56 Or LUBA 704 (2008), *aff'd*, 224 Or App 1, 197 P3d 48 (2008). In this as-applied challenge, petitioner cannot directly challenge the manner in which the city adopted its appeal fee structure. To the extent that petitioner's arguments challenge the city's prior fee

resolutions, those challenges are not within our scope of review in this appeal. Even if that issue were before us, nothing in ORS 227.180(1)(c) prohibits the city's method of adopting its appeal fee. As explained, the city adopted OCMC 17.50.290 by ordinance and the city set its fee schedule by resolution. That procedure is not prohibited by ORS 227.180, which authorizes the city to "prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal."

We also reject petitioner's challenge to the city's method for setting the amount of the appeal fee. "[I]n the context of an as-applied challenge the initial burden rests on the local appellant to produce a *prima facie* case that the appeal fee that is charged pursuant to a previously adopted fee schedule is 'more than the average cost of such appeals or the actual cost of the appeal.'" *Young*, 56 Or LUBA at 717. If petitioner satisfies that initial burden, then the burden shifts to the local government to demonstrate that the appeal fee is reasonable and consistent with the statutory authority. *McGovern v. Crook County*, 57 Or LUBA 443, 552, *aff'd*, 224 Or App 687, 200 P3d 181 (2008). Intervenor contends that petitioner failed to make his required *prima facie* showing and, thus, the city was not required to defend its fee structure. Respondent and intervenor argue, and we agree, that even if petitioner made the *prima facie* showing, the city demonstrated that its fees are consistent with ORS 227.180(1)(c) and OCMC 17.50.290. ORS 227.180(1)(c) and OCMC 17.50.290 do not prescribe a method of calculating the average cost of an

appeal to the city commission. ORS 227.180(1)(c) authorizes cities to impose fees to "defray" the city's costs in action on an appeal and those fees may be "tailored to the actual costs of particular appeals." *1000 Friends v. Crook County*, 60 Or LUBA 232, 242–43 (2009).

The city explained in its decision that the appeal fee is based on staff time estimates and costs for processing an appeal with an annual increase based on inflation estimated by the consumer price index. The city's actual attorney fees are charged at the actual cost to the city. Petitioner has not demonstrated that the appeal fee that the city charged pursuant to a previously adopted fee schedule is more than the average cost of such appeals or the actual cost of petitioner's appeal. In addition, the city demonstrated that the appeal fee is reasonable and consistent with the statutory authority. The fact that the city's appeal fee is based on an estimate of average costs instead of an arithmetic average of prior appeal costs provides no basis for reversal or remand. *Id.* at 240.

Petitioner additionally argues that ORS 227.180(1)(c) does not permit a fee structure based on both "average cost" and "actual cost." Petition for Review 25. ORS 227.180(1)(c) provides that "[t]he amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript." Petitioner failed to develop that argument sufficiently for our review. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220

(1982) ("It is not our function to supply petitioner with legal theories or to make petitioner's case for petitioner."). To the extent that the response briefs address the issue, we agree with the city that ORS 227.180 affords local governments broad discretion in calculating and assessing local appeal fees to defray the costs incurred in acting upon an appeal. Petitioner has not demonstrated that the city's method, which combines average and actual costs, violates ORS 227.180(1)(c). In the absence of any developed argument from petitioner, we will not read the term "or" in ORS 227.180(1)(c) to limit the city's ability to defray the cost of the local appeal in the manner authorized by the city's adopted code and applicable appeal fee schedule. *See Burke v. DLCD*, 352 Or 428, 435, 290 P3d 790 (2012) (observing that the term "or" can be, and often is, inclusive).

We also reject petitioner's argument that ORS 227.180 does not allow the city to assess actual attorney fees after the appeal proceeding had concluded. ORS 227.180 authorizes the city to assess a fee based on the actual cost of the appeal, which will often, if not always, be calculated and known only after the conclusion of the local appeal proceeding.

For the reasons explained above, petitioner's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city erred by failing to apply the 1990 End of the Oregon National Historic Trail Master Plan (EOT Plan) and the 1991 End

of the Oregon National Historic Trail District Design Guidelines (Guidelines) to intervenor's proposal.[4] Petitioner does not state the applicable standard of review he thinks applies to our review of his second assignment of error.[5] We consider petitioner's second assignment of error as an argument that the city commission improperly construed the applicable law when it concluded that that the EOT Plan and Guidelines do not constitute mandatory approval criteria. ORS 197.835(9)(a)(D). Whether the EOT Plan and Guidelines are applicable law present interpretive questions. LUBA is required to accept the city commission's interpretation of its own comprehensive plan and land use regulations if the interpretation is plausible and not inconsistent with the express language, purpose, or policy of the comprehensive plan or land use regulations. ORS 197.829(1); *Siporen*, 349 Or 247; see n 3.

The city found that neither the EOT Plan or Guidelines are approval criteria that are relevant to the application. The city found that the city "did not adopt the EOT Plan, or the EOT Guidelines as a component, ancillary or otherwise, of the Comprehensive Plan or land use regulations." Record 45. The city reasoned:

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[4] Petitioner asserts that the approved development violates the Guidelines because the proposed hotel violates the maximum height limitation and exterior material specifications in the Guidelines. Petitioner does not argue that the city's decision violates any substantive criteria in the EOT Plan.

[5] OAR 661-010-0030(4)(d) provides, in part, "Each assignment of error must state the applicable standard of review."

> "The City has not set forth the [EOT Plan] and [Guidelines] in the OCMC, either directly or by incorporation.
>
> "Although a number of citizens argued that the City Commission 'effectively' or 'constructively' adopted the [EOT Plan] and Design Guidelines on December 19, 1990, the [City] denies this contention for two reasons. First, the law does not recognize 'effective' or 'constructive' adoption; the City Commission must follow specific procedures to adopt a document, and if that does not occur, the City Commission has not adopted the document. The citizens do not contend that the City Commission followed its formal procedures to adopt the [EOT Plan] or Design Guidelines. Second, the meeting minutes of the December 19,1990 City Commission meeting have not been submitted into the record. The minutes were not submitted from the public and the City Recorder also did not locate any record that the City Commission has adopted these items. Therefore, there is no basis to conclude that the City Commission adopted the [EOT Plan] and Design Guidelines."

Record 45. The city relied on statements from a senior planner who reviewed the city's historic planning files from 1988 to 1995 and explained that there is no indication in those records that the Guidelines were ever adopted by the City Commission. The senior planner further stated, "In the 16 years I have been with the City, we have never reviewed an application for compliance with these 1991 Design Guidelines." Record 46.

Petitioner does not assign error to the city's finding that the city never adopted the EOT Plan and Guidelines and petitioner does not challenge the evidence upon which the city commission relied.[6] Instead, petitioner argues

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[6] Petitioner's second assignment of error is undermined by his failure to assign error to that city finding. If petitioner assigned error to that finding, then

that other evidence in the record supports his assertion that the city adopted the EOT Plan and Guidelines by reference.

We understand petitioner to first argue that the city commission "effectively" adopted the EOT plan by discussing it and "endorsing" it over many years. Petition for Review 29–37. Petitioner relies on planning commission meeting minutes from September 22, 1998 that noted that the EOT Plan was "approved but not adopted by ordinance, therefore, not making the [EOT Plan] an approved document." Record 5782. Petitioner also directs us to May 24, 1999, planning commission work session minutes, which reflect that the EOT Plan was "used as a reference and it should not be completely abandoned." Record 6688. However, those quotations support the city's finding that the EOT Plan was never adopted by the city. Even accepting petitioner's assertions that the city commission was aware of and expressed support for the EOT Plan, that "endorsement" does not amount to *adoption* of as mandatory approval criteria.

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we would review that challenge to determine whether it is supported by substantial evidence in the record. *See* ORS 197.835(9)(a)(C) (LUBA shall reverse or remand a land use decision if LUBA finds that the local government "[m]ade a decision not supported by substantial evidence in the whole record"); OAR 661-010-0071(2)(b) the Board shall remand a land use decision that "is not supported by substantial evidence in the whole record"). Even viewing petitioner's second assignment of error as assigning error to the city's finding that the EOT Plan and Guidelines were never adopted, we would deny that assignment because the city's findings are supported by substantial evidence.

Petitioner next argues that the EOT Plan and Guidelines are "ancillary documents" that have been incorporated by reference into the city's 2004 Comprehensive Plan through the city's 1999 Downtown Community Plan (DCP). OCMC 17.65.050(C)(6) requires a finding that a general development plan "is consistent with the Oregon City Comprehensive Plan and its ancillary documents." In 1999, the city participated in a downtown planning process in which a consultant group prepared a plan to update the city's comprehensive plan and zoning code and establish "a vision and implementing strategies for positive growth and improvement of the area." Record 4595. As petitioner emphasizes, the DCP in Part I referred to the EOT Plan. The DCP characterized the area including and surrounding the subject property as a Tourist Commercial District and explained:

> "The district is intended to provide supporting commercial uses for the End of the Trail area, along with supplying some office space. The established range of uses in the existing Tourist Commercial district has not changed with the exception of adding office uses to the list of permitted uses.
>
> "New construction in the End of the Oregon Trail District will be guided by the End of the Oregon Trail Master Plan." Record 4609.

A DCP section titled "Design Guidelines" explained:

> "Two types of design guidelines are included in the plan. One set pertains to new development and alterations in the Historic Downtown District. The other set of design guidelines are considered general guidelines and pertain to elsewhere within the study boundary. Both sets of design guidelines are summarized below—please see the Technical Appendix for the full text. A third set of guidelines, the *End of the Oregon Trail District Guidelines, 1991*, are incorporated by reference." Record 4637.

DCP "Part II – Technical Appendix" provided "Draft Comprehensive Plan Text Amendment" draft policies. Record 6844.

> "Tourist commercial zoning will be applied to implement the End of the Oregon Trail Master Plan. High density tourist commercial and/or office development will be encouraged across from the Oregon Trail Interpretive Center and near the planned high speed rail station.
>
> "* * * * *
>
> "Design review for new development in the Tourist Commercial District shall be reviewed for consistency with the design guidelines contained in the End of the Oregon Trail Master Plan." Record 6854–55.

The DCP was intended to guide the city through updating the comprehensive plan and zoning code. The DCP itself was not enacted as a mandatory land use ordinance. In June 2004, the city amended its comprehensive plan. Record 4433. The 2004 comprehensive plan explained:

> "In 1999, the goals and policies from the [DCP] were added to the 1982 Comprehensive Plan. The goals and policies have been incorporated in the Economic Development and Housing sections of this Comprehensive Plan (Sections 9 and 10, respectively). The *Downtown Community Plan* in its entirety (Phase 1) is considered ancillary to the Comprehensive Plan." Record 4449 (emphasis in original).

Since 1982, several documents have been adopted as ancillary to the 1982 Comprehensive Plan, including the DCP. Record 4453. As explained above, the DCP referred to the Guidelines and stated that they were "incorporated by reference." Record 4637.

Intervenor concedes that the DCP is an "ancillary" document to the comprehensive plan; however, intervenor argues that the city correctly concluded that the DCP did not transform the Guidelines into mandatory approval criteria. We agree. While the DCP uses the words "incorporated by reference," the Guidelines were not appended to the DCP and the city found that the Guidelines have not been incorporated into the city's comprehensive plan or land use code. To the extent that petitioner has provided evidence that the city has referred to the Guidelines, those references are aspirational and not mandatory. We recognize the conflict and confusion caused by the incorporation language in the DCP; nevertheless, we conclude that the city's interpretation of its own code is plausible and not inconsistent with the city's comprehensive plan or land use regulations. The Guidelines are not applicable law and thus any noncompliance with the Guidelines provides no basis for reversal or remand.

The second assignment of error is denied.

CONDITIONAL MOTION TO TRANSFER TO CIRCUIT COURT

Pursuant to ORS 34.102(4) and OAR 661-010-0075(11), petitioner filed a conditional motion to transfer to circuit court in the event that the Board determined that the challenged decisions are not reviewable as a land use decision.[7] The city and intervenor do not oppose the motion. However, the two

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[7] ORS 34.102(4) provides:

challenged decisions are reviewable as land use decisions. LUBA concluded above that petitioner's challenge to the amount of attorney fees charged to petitioner in the invoice the city sent to petitioner post-decision is not an issue that is within LUBA's scope of review. LUBA can only transfer to circuit court a decision that LUBA concludes is not a "land use decision." LUBA cannot transfer a discrete "issue" to circuit court. Petitioner does not argue that the invoice is a separate "decision" that could be isolated from the land use decisions before us and potentially be transferred to circuit court. Petitioner may be able to present that evidentiary issue in a declaratory ruling action or similar action in circuit court. But in the circumstances of this case the transfer

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> "A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition."
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> OAR 661-010-0075(11)(c) provides:
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> "If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made."

provisions of ORS 34.102(4) and OAR 661-010-0075(11) are not permissible vehicles to "transfer" this appeal or any discrete issue in this appeal to the circuit court.

Petitioner's motion to transfer is denied.

The city's decision is affirmed.